Cayman Development (SP) Sdn Bhd (in winding up) v Badan Pengurusan Bersama Kompleks Cayman & Anor

HIGH COURT (ALOR SETAR) — ORGINATING SUMMONS NO 24NCVC-1169–7 OF 2012
SEE MEE CHUN JC
21 MARCH 2013

Land Law — Strata title — Management corporation — Plaintiff's application to declare first defendant unlawful — Whether two bodies could be responsible for management of complex — Whether plaintiff ought to have appealed against decision of second defendant not to cancel registration of first defendant — Locus standi — Whether plaintiff had locus standi to seek declaration — Strata Titles Act 1985 s 39(1) — Building and Common Property (Maintenance and Management) Act 2007 — Specific Relief Act 1950 ss 4(1) & 41

On 3 October 2009, following a meeting convened by the plaintiff, the Cayman Complex Joint Management Body ('the first defendant') was established. A certificate that the first defendant was duly constituted was issued by the Commissioner of Buildings pursuant to s 7 of the Building and Common Property (Maintenance and Management) Act 2007 (the 2007 Act). On 28 February 2012, the plaintiff was informed by the state land office that a book of the strata title register had been opened, which meant that a management corporation ('MC') had come into operation by force of the law, namely s 39(1) of the Strata Titles Act 1985 ('the 1985 Act'). Hence there came into existence two bodies responsible for the Cayman Complex, ie the first defendant and the MC. The plaintiff then wrote to the second defendant to cancel the registration of the first defendant, which the latter rejected. The plaintiff thus filed the present application for, inter alia, a declaration that the first defendant be declared unlawful. The first defendant submitted that since the plaintiff was in effect challenging the second defendant's decision to not cancel the registration of the first defendant, it ought to have appealed against that decision within the 14 days as stipulated in s 41 of the Act. It was therefore the first defendant's contention that the plaintiff by not appealing against the second defendant's decision was now barred from mounting any challenge against that decision.

Held, allowing the application:

(1) The provision of s 39(1) of the 1985 Act and s 4(1) of the Act made it clear that there can be only one body responsible for the Cayman Complex, be it the MC or the first defendant. There can be no co-existence of both the first defendant and the MC (see para 4).

A (2) In the instant case, with the opening of the book of the strata title and the existence of the MC under s 39 of the 1985 Act, the provisions in the Act including that of s 41 of the Act on appeal to the state authority could not possibly apply (see para 8).

B (3) The plaintiff had locus standi to seek a declaration within the meaning of s 41 of the Specific Relief Act 1950, which requires such person entitled to any legal character to institute a suit against any person denying his title to the character. Due to the broad meaning of 'legal character' the plaintiff had the locus to seek a declaration that the first defendant was invalid (see paras 9 & 11).

C

[Bahasa Malaysia summary

Pada 3 Oktober 2009, berikutan mesyuarat yang diadakan oleh plaintif, Badan Pengurusan Bersama Kompleks Cayman ('defendan pertama') ditubuhkan. D Sijil bahawa defendan pertama ditubuhkan dikeluarkan oleh Pesuruhjaya Bangunan berikutan s 7 Akta Bangunan dan Harta Bersama (Penyenggaraan dan Pengurusan) 2007 ('Akta'). Pada 28 Februari 2012, plaintif diberitahu oleh pejabat tanah kerajaan bahawa buku hak milik daftar strata telah dibuka, yang bermaksud bahawa perbadanan pengurusan ('MC') telah beroperasi dengan E kuatkuasa undang-undang, iaitu s 39(1) Akta Hak Milik Strata 1985 ('Akta 1985'). Maka, wujud dua badan yang bertanggungjawab untuk Kompleks Cayman, iaitu defendan pertama dan MC. Plaintif kemudiannya menulis kepada defendan kedua untuk membatalkan pendaftaran defendan pertama, yang ditolak oleh defendan kedua. Plaintif oleh itu memfailkan permohonan F ini untuk, antara lain, perisytiharan bahawa defendan pertama diisytiharkan tak sah. Defendan pertama berhujah bahawa memandangkan plaintif sebenarnya mencabar keputusan defendan kedua untuk tidak membatalkan pendaftaran defendan pertama, ia patut merayu terhadap keputusan tersebut dalam masa 14 hari seperti yang ditetapkan di dalam s 41 Akta. Oleh itu G hujahan defendan pertama bahawa plaintif dengan tidak merayu terhadap keputusan defendan kedua sekarang dihalang daripada memulakan apa-apa cabaran terhadap keputusan tersebut.

Diputuskan, membenarkan permohonan:

H (1) Peruntukan s 39(1) Akta 1985 dan s 4(1) Akta memperuntukkan dengan jelas bahawa hanya terdapat satu badan bertanggungjawab untuk Kompleks Cayman, sama ada MC atau defendan pertama. Tidak akan terdapat kewujudan bersama kedua-dua defendan pertama dan MC (lihat perenggan 4).

I (2) Dalam kes ini, dengan pembukaan buku daftar strata dan kewujudan MC di bawah s 39 Akta 1985, peruntukan dalam Akta termasuk s 41 Akta atas rayuan kepada pihak berkuasa tidak mungkin diguna pakai (lihat perenggan 8).

(3) Plaintif mempunyai locus standi untuk memohon perisytiharan dalam maksud s 41 Akta Relief Spesifik 1950, yang memerlukan orang sedemikian berhak kepada apa-apa sifat undang-undang untuk memulakan tindakan terhadap mana-mana orang yang menafikan hak miliknya terhadap sifat tersebut. Akibat maksud luas 'legal character' plaintif mempunyai locus untuk memohon perisytiharan bahawa defendan pertama adalah tak sah (lihat perenggan 9 & 11).]

Notes

For cases on management corporation, see 8(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 5280–5297.

Cases referred to

Lim Cho Hock v Government of the State of Perak, Menteri Besar, State of Perak and President, Municipality of Ipoh [1980] 2 MLJ 148 (refd)

Perbadanan Pengurusan Menara Gurney & Ors v Pesuruhjaya Bangunan, Majlis Perbandaran Pulau Pinang & Anor [2011] 6 CLJ 583, HC (distd)

Plaza Pekeliling Management Corporation v IGB Corporation Sdn Bhd [2001] MLJU 28, HC (refd)

Tan Sri Haji Othman Saat v Mohamed bin Ismail [1982] 2 MLJ 177, FC (refd)

Legislation referred to

Building and Common Property (Maintenance and Management) Act 2007 s 7

Specific Relief Act 1950 ss 4(1), 41, 44

Strata Titles Act 1985 s 39, 39(1)

Eugene Daniel Louis (ED Louis & Assoc) for the plaintiff.
Lee Khai (SS Tham with him) (Ong and Manecksha) for the first defendant.
Mirzawati Ahmad (Mirzawati & Assoc) for the second defendant.

See Mee Chun JC:

[1] Enclosure (1) is the plaintiff's application, inter alia, for a declaration that D1, Cayman Complex Joint Management Body (JMB) be declared unlawful. It is common ground Cayman Complex JMB was established on 3 October 2009 following a meeting convened by the plaintiff in its capacity as liquidator for the developer of Cayman Complex ('the complex'). A certificate that JMB was duly constituted was issued by the Commissioner of Buildings pursuant to s 7 of the Building and Common Property (Maintenance and Management) Act 2007 (Act 663). On 28 February 2012 the plaintiff was informed vide letter from the state land office a book of the strata title register had been opened on 30 January 2003 (JSR5). The plaintiff wrote to D2 on 6 March 2012 to cancel the registration of JMB which was rejected on 20 March 2012.

[2] As the facts now stand, there is in existence two bodies in respect of the complex-JMB and the management corporation (MC). This is because s 39(1) of the Strata Titles Act 1985 (Act 318) provides as follows:

> 39 Establishment of management corporation
>
> (1) Upon the opening of a book of the strata register in respect of a subdivided building or land there shall, by the operation of this section, come into existence a management corporation consisting of all the parcel proprietors including in the case of phased development, the proprietor of the provisional block or blocks.

Hence with the letter from the state land office that a book of the strata title register had been opened on 30 January 2003 this meant a MC had come into operation by force of law.

[3] As between Act 318 and Act 663, s 4(1) of Act 663 itself recognises the MC ought to prevail. It states as follows:

> 4(1) Where a building or land intended for subdivision into parcels has been completed:
>
> (a) before the commencement of this Act and vacant possession of the parcels has been delivered by the developer to purchasers but the management corporation has not come into existence, a Joint Management Body shall be established consisting of the developer and the purchasers upon the convening of the meeting not later than twelve months from the commencement of this Act; and

This provision states if a MC has not come into existence, a JMB can be established. It therefore follows if there is a MC there can be no JMB.

[4] The unreported case of *Plaza Pekeliling Management Corporation v IGB Corporation and Anor* [2001] MLJU 28 (S6–24–640 of 2000) illustrates the above point. It states at p 6 of the judgment:

> Badan pengurusan yang sah untuk mengurus bagi keseluruhan Kompleks Plaza Pekeliling itu ialah Plaza Pekeliling Management Corporation iaitu Plaintif kerana Plaintif telah ditubuhkan mengikut s. 39 Akta Hakmilik Strata 1985 untuk tujuan tersebut. Dan tidak ada peruntukan di dalam Akta tersebut yang membahagikan tugas-tugas badan tersebut dengan satu badan yang lain.

and

… s 39 Akta tersebut tidak memberi kuasa untukpenubuhan lebih dari satu badan pengurusan bagi satu bangunan.

Although that case concerned the issue of whether there could be two MCs, the principle extrapolated is there can only be one body responsible for the complex be it the MC or JMB. Here the provision of s 39(1) of Act 318 and s 4(1) of Act 663 makes it clear it can only be one MC. There can be no co existence of MC and JMB.

[5] It was submitted that s 44 of Act 663 applies such that Act 663 prevails. It states as follows:

Section 44 Non-application of other written laws, contracts and deeds

On the coming into operation of this Act, in a local authority area or part of a local authority area or in any other area, the provisions of any written law, contracts and deeds relating to the maintenance and management of buildings and common property in as far as they are contrary to the provisions of this Act shall cease to have effect within the local authority area or that other area.

As was the court's earlier finding that s 4(1) of Act 663 recognises if there is a MC there can be no JMB such that Act 318 cannot possibly be contrary to Act 663.

[6] JMB had submitted what was really being challenged by the plaintiff was the decision of D2 in not cancelling the registration of JMB. Since the decision was made on 20 March 2012, the plaintiff had to appeal within 14 days as stipulated in s 41 of Act 663. Since this was not done, the plaintiff is barred from mounting any challenge. Section 41 provides:

41 Appeals to the State Authority

Any person or body aggrieved by any act or decision of the Commissioner under this Act may, within fourteen days after having been notified of the action or decision to the State Authority; and the decision of the State Authority shall be final and shall not be questioned in any Court.

[7] The case of *Perbadanan Pengurusan Menara Gurney & Ors v Pesuruhjaya Bangunan, Majlis Perbandaran Pulau Pinang & Anor* [2011] 6 CLJ 583 was referred to and in particular at p 594 where it states:

(31) There is a plethora of case law that lays down the principle which when applied to the circumstances of this case dictate that the applicants should avail itself of the remedy under s 41 rather than go by way of judicial review. To hold otherwise would tantamount to deliberately frustrating the clear intentions of legislature which has enacted this provision at the behest of the executive. This is not just a case of s 41 being an alternative remedy. It is clear to me that having regard to the purpose and

A intent of Act 663 and the specific enactment of a provision in terms of s 41, that Parliament intended that parties who are aggrieved by any act or decision of the Commissioner, appeal to the State Authority.

B **[8]** In this regard the facts of *Menara Gurney* differ. In our instant case with the opening of the book of the strata title and the existence of MC under s 39 of Act 318, the provision Act 663 including that of s 41 on appeal to state authority cannot possibly apply.

C **[9]** The plaintiff has locus standi to seek a declaration within the meaning of s 41 of the Specific Relief Act 1950 (Act 137) which requires such person to be entitled to any legal character to institute a suit against any person denying his title to the character. Refer to *Jain and Jain Principles of Administrative Law* (6th Enlarged Ed 2007) where it is opined the expression 'legal character' is of very
D broad import and may include various rights of the plaintiff. At pp 2330 and 2331 'legal character means a position recognised by law', 'is synonymous with legal status' and 'includes the status of a person and would cover many situations where a legal right of a person is infringed by an illegal or ultra vires action of an administrative body'.
E

[10] Further in *Lim Cho Hock v The Government of the State of Perak & Ors* [1980] 2 MLJ 148 it was stated at p 151:

F > The jurisdiction to grant declarations is extremely wide … the power of the court to make a declaration … is now almost unlimited; I might say only limited by its own discretion … the power to grant a declaration should be exercised with a proper sense of responsibility and a full realisation that judicial pronouncements ought not to be issued unless there are circumstances that call for their making. Beyond that there is no legal restriction on the award of a declaration.
G

In *Tan Sri Haji Othman Saat v Mohamed bin Ismail* [1982] 2 MLJ 177 it was said at p 178 'it would seem that the plaintiff in proceedings for a declaration need do no more than establish that he has a 'real interest' in the suit'.

H

[11] Due to the broad meaning of 'legal character' the plaintiff has the locus to seek a declaration that JMB is invalid. The court has the power to grant such a declaration and did so for the reasons given above.

I

[12] Accordingly encl (1) was allowed.

Application allowed.

Reported by Kohila Nesan